STATEMENT

1. This case arises under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, pertaining to employment discrimination. Section 703(a)(1) of that Act, 42 U.S.C. 2000e–2(a)(1), makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Section 704(a) of the Act further makes it an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge" of employment discrimination with the Equal Employment Opportunity Commission.

The enforcement provisions of Title VII are set forth in Section 706. After state or local employment discrimination remedies, if any, have been exhausted, a person aggrieved by an unlawful employment practice may file a charge with the Commission. The Commission thereupon investigates to determine whether there is reasonable cause to believe that the charge is true and, if such reasonable cause is found, the Commission endeavors to eliminate the unlawful employment practice through conciliation and persuasion.

Section 706 further provides for judicial enforcement if voluntary compliance is not secured. As originally enacted, Section 706(e), 42 U.S.C. 2000e–5(e),

provided that "[i]f within thirty days after a charge is filed with the Commission * * * the Commission has been unable to obtain voluntary compliance * * *, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *." The statute made no express provision for preliminary injunctive relief pending disposition of the charge by the Commission.

The enforcement provisions were amended in 1972, and this case arises under the Act as so amended. Section 706(f), 42 U.S.C. (Supp. II) 2000e-5(f), which replaced the former Section 706(e), now provides in pertinent part:

> (1) If within thirty days after a charge is filed with the Commission * * * the Commission has been unable to secure from the respondent a conciliation agreement * * * the Commission may bring a civil action against [the] respondent * * *. * * * The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission * * *. If a charge filed with the Commission * * * is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action * * * or * * * entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in

the charge * * * by the person claiming to be aggrieved * * *. * * *

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission * * * may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. * * *

2. With this statutory background in mind, we turn to the particular facts of this case. On April 6, 1972, respondent filed a charge of employment discrimination with the Commission, alleging that petitioner, her employer, had discriminated against her with respect to compensation because of her sex, in violation of Section 703(a)(1) of the Act. On the following day, petitioner discharged respondent without any prior warning. Shortly thereafter, on April 10, 1972, respondent filed a supplemental charge with the Commission, alleging that her discharge was in retaliation for the filing of her original employment discrimination charge and therefore violated Section 704(a).

Before the Commission took any action with respect to her charges of employment discrimination, respondent, on April 20, 1972, brought suit for preliminary injunctive relief in the United States District Court for the Northern District of Georgia. Three weeks later the Commission, acting pursuant to Section 706 (f)(2), brought its own suit for preliminary relief on respondent's behalf. The specific relief requested in each suit was respondent's reinstatement with back

pay pending final disposition of her charges by the Commission.

After a joint hearing, the district court dismissed respondent's suit for lack of subject matter jurisdiction (Pet. App. A16–A21) but granted the preliminary relief which the Commission had requested on her behalf.[1] The district court assessed against respondent the costs of her private suit, and denied any allowance of fees to her attorney. The court of appeals reversed, holding that the district court did have subject matter jurisdiction over respondent's private suit and that it therefore was "improper to charge her with the costs of the trial court action and to fail to consider the request for attorney's fees" (Pet. App. A15).

DISCUSSION

We agree with the court of appeals that the district court had subject matter jurisdiction over respondent's private suit for preliminary injunctive relief against employment discrimination.

1. The federal district courts possess "customary authority to grant temporary injunctive relief." *Sampson* v. *Murray*, No. 72–403, decided February 19, 1974 (slip op. 18).[2] Nothing in Title VII ex-

[1] The decision granting preliminary relief was affirmed *per curiam* on appeal, 475 F. 579, and this Court denied certiorari, 414 U.S. 854.

[2] In this case, unlike *Sampson* v. *Murray*, *supra*, the question whether the district court had authority to issue a preliminary injunction arises separately from the question whether the relief was properly granted, for the latter question was disposed of in separate litigation brought by the Commission. See n. 1, *supra*.

pressly bars victims of employment discrimination from bringing private suits for preliminary injunctive relief. Thus the district court here had jurisdiction unless the statutory scheme by necessary implication prevents the federal courts from exercising their customary equitable powers at the instance of a private party plaintiff.[5] Compare *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, and *Sampson* v. *Murray*, *supra*, with *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, and *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800.

Under the statutory scheme established by Title VII, once a charge of employment discrimination is filed the Commission must investigate the charge, make a determination as to whether there is reasonable cause to believe that the charge is true, and, if it so finds, attempt conciliation. Before 1972, only the complainant could bring suit on the basis of the charge. This could be done at two junctures: (1) 30 days after the charge had been filed by means of the complainant's requesting a notice of right to sue; and (2) after final termination of the administrative proceedings upon the failure of conciliation.

Since 1972 the Commission itself may sue on the charge, but only after completion of the administrative process through failure of conciliation. The 1972 amendments did not abolish the private right of suit,

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[5] There is no jurisdictional issue apart from that raised by petitioner under Title VII: if that statute did not preclude respondent's suit, jurisdiction rested on 28 U.S.C. 1343(4). See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 412, n. 1.

but they did extend the period during which the complainant ordinarily may not sue from 30 days to 180 days. The amendments also specifically authorized the Commission to seek preliminary relief on behalf of the complainant (see p. 4, *supra*). The principal question in this case is whether, in so doing, Congress barred a complainant from seeking preliminary relief prior to the expiration of the 180-day period during which a complainant ordinarily may not bring a suit on the merits. We submit that it did not.

Title VII as originally enacted made no provision for temporary or preliminary injunctive relief pending the Commission's disposition of a charge of employment discrimination. See p. 3, *supra*. But nothing in the statute suggested that such relief was thereby made unavailable to the aggrieved employee. To the contrary, Title VII conferred upon employees a statutory right to be free of employment discrimination, and the federal courts historically have possessed the equitable powers necessary to protect federal statutory rights, at least to the extent of preserving the *status quo* pending administrative action—which is all that is involved in the relief sought here. See, generally, Jaffe, *Judicial Control of Administrative Action* 677–686 (1965). Moreover, nothing in the legislative history or the language of the 1972 amendments suggests that Congress, by conferring upon the Commission the authority to bring suit for preliminary relief in appropriate cases, intended to limit or abolish any private right to sue for such relief.

2. The availability of preliminary injunctive relief at the instance of the aggrieved person is consistent

with the purpose and structure of the statutory scheme.

The broad goal of Title VII is the elimination of employment discrimination on account of race, color, religion, sex, or national origin, and Congress hoped that this comprehensive goal would be achieved primarily through conciliation and persuasion. The premature initiation of private suits for permanent relief might in some instances interfere with the Commission's conciliation efforts. And even if the private plaintiff were successful in obtaining full relief from discrimination against himself, the judicial remedy would (at least in the absence of a class action) tend to be narrower and more particularized than a voluntary conciliation agreement, which might cover all employees and all forms of discrimination. Moreover, final disposition of the individual cause of action could tend to reduce the employer's immediate incentive for voluntarily undertaking a more general compliance. It is at least partly for these reasons, we believe, that Title VII implicitly bars the bringing of private suits for permanent relief within 180 days of the filing of a charge (except where the Commission takes some action to permit an earlier suit). To this extent, the statute subordinates the individual's interest in full and immediate relief to society's interest in a more comprehensive solution to the underlying problem of employment discrimination.

But any reasons for barring private suits for *permanent* relief during the pendency of conciliation procedures do not similarly militate against the bringing of suits for *preliminary* relief. Such suits would not

disrupt the Commission's efforts at obtaining voluntary compliance; neither the grant nor the denial of preliminary relief would adversely affect compliance procedures. Since the denial of preliminary relief would not represent a decision on the merits of the employment discrimination claim, such a denial would be unlikely to make the employer more intransigent. And a grant of preliminary relief could in some cases "enhance * * * the effectiveness of conciliation by increasing the pressure on the [employer] to agree to settlement." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1258 (1971). Indeed, Congress evidenced its awareness that suits for preliminary relief are compatible with negotiations for voluntary compliance by empowering the Commission to pursue both courses simultaneously.

It may be assumed (at least for purposes of this case) that preliminary injunctive relief will be granted only in the special circumstances where preservation of the *status quo* is necessary to prevent irreparable harm.[4] But we believe that it is important

[4] Thus in *Jerome* v. *Viviano Food Company, Inc.*, 489 F. 2d 965 (C.A. 6), a denial of preliminary relief was affirmed where there was no showing of irreparable harm and the relief sought—an order requiring an employer to hire an unsuccessful applicant for employment—would in fact have changed the *status quo*. Contrary to the March 15, 1974, letter from petitioner's counsel, there is no conflict between *Jerome* and the decision below. *Jerome* was not decided on jurisdictional grounds but on the failure to show irreparable harm, and the court of appeals there expressly distinguished the instant case as one where irreparable harm had been established (489 F. 2d at 966).

to the effectuation of the broad statutory purposes that it be available in such exceptional cases, and particularly in cases, such as this, that involve an employer's retaliation against an employee on account of her assertion of Title VII rights. The enforcement of Title VII depends in large part on the willingness of employees and other affected individuals to file charges with the Commission; retaliation, which undercuts this basic enforcement mechanism by chilling employees' willingness to assert their rights, especially calls for an immediate remedy. Cf. *National Labor Relations Board* v. *Marine Workers*, 391 U.S. 418; *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117.

Unfortunately, the workload and budget of the Commission are such that it is unable to sue for preliminary injunctive relief in all meritorious cases, or even merely in all meritorious retaliation cases. The Commission's limited resources permit it to sue for such relief only in especially compelling cases, on behalf of plaintiffs unable to obtain representation on their own. Therefore, if preliminary injunctive relief is to be broadly effective as a remedial device, it must be available at the instance of private party plaintiffs.

In short, the availability of preliminary relief at the instance of the aggrieved person in exceptional cases is necessary to full effectuation of the rights created by Title VII and does not conflict with the broader statutory goal of eliminating employment discrimination generally. In these circumstances, it would be anomalous to interpret the mere silence of Con-

gress as having the self-defeating effect of precluding such relief. See, generally, Note, *supra*, 84 Harv. L. Rev. at 1256–1259.

3. This Court in *Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, inferred a congressional intent to bar suits for preliminary relief with respect to matters pending before the Interstate Commerce Commission. See, also, *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, *supra*; *United States* v. *SCRAP*, 412 U.S. 669. In so deciding, the Court relied in part on the necessity of preserving that agency's primary jurisdiction to determine the reasonableness of rates and in part on the importance of maintaining a nationally uniform rate structure. But the statutory inference in that case derived principally from the congressional vesting of a limited suspension power in the agency; the legislative history of that suspension power, when read in light of the considerations of primary jurisdiction and uniformity, revealed a purpose "to withdraw from the judiciary any pre-existing power to grant injunctive relief." *Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, 372 U.S. at 667. None of the factors which led to this Court's decision in *Arrow Transportation* are present here.

First, the Equal Employment Opportunity Commission has no suspension or cease-and-desist power. The Commission's only analogous authority is to bring suit for preliminary relief; that authority is not cast in exclusive terms and, as we have shown above (pp. 5–11, *supra*), there is no reason why that authority should be read as exclusively lodged in the Commis-

sion. Under the statute the ultimate power to grant relief remains in the courts, and they interfere with no prerogative of the Commission by granting such relief at the request of a private party.

Second, the Commission lacks "primary jurisdiction." As this Court observed in *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, decided February 19, 1974 (slip op. 7):

> The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts.

The Commission is not even empowered to make findings conclusive of private rights subject only to the narrow review normally accorded administrative decision-making. Thus even if the Commission finds that there is no reasonable cause to believe that a charge of employment discrimination is true, the person making the charge is nevertheless entitled to a *de novo* adjudication in a federal district court. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. Similarly, a Commission finding of reasonable cause would carry no weight in subsequent litigation. Thus a tentative judicial assessment of the merits of an employment discrimination claim, made in the course of granting or denying preliminary relief, would not constitute a "judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, 372 U.S. at 670.

Third, whereas in *Arrow Transportation* this Court was concerned with Congress' interest in preserving uniformity of rate levels, the uniformity Congress

sought by enacting Title VII was the nationwide elimination of employment discrimination. That goal is advanced by the availability of preliminary injunctive relief at the instance of a private party plaintiff.

CONCLUSION

For the foregoing reasons, it is the view of the United States that the decision of the court of appeals was correct and accordingly that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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